

Moultonborough, NH 03254

March 16, 2022

DRAFT Minutes

Present:	Members:	Bob Stephens, Robert St. Peter, Nick DeMeo, Sean Poloian, Michael Mills,
Excused:	Alternate:	Steve Buy, Richard Jenny, Jerry Hopkins
Staff Present:	Dari Sassan, Town Planner; Bonnie L. Whitney, Administrative Assistant	

I. Call to Order: Chairman Stephens called the meeting to order at 7:00 PM and led the Pledge of Allegiance. The Board and Staff then introduced themselves to the public.

II. Pledge of Allegiance

III. Review/Approval of Minutes:

Motion: Mr. Poloian made the motion to approve the February 16, 2022, minutes as written. Mr. DeMeo Seconded. The Motion carried unanimously.

IV. Hearings:

1. Walter C. Larson Revocable Trust of 2013 and Sarah J. Larson Revocable Trust of 2013
(131-30) (204 Wentworth Shores Road) Variance from Section 3.2.1

Attorney John Arnold, Orr & Reno, was present representing the applicants. Mr. Arnold noted the variance request is to allow the construction of a garage within 41' of the centerline of Wentworth Shores Road, where 50' is required.

Mr. Arnold gave a brief overview of the property, the existing improvements to the property and the proposed project. Currently there is an existing house and driveway. Mr. Arnold pointed out the location of the proposed garage. The measurement from the center of the road to the front corner of the garage is just over 41'. Mr. Arnold referred to the plan that depicts the 50' waterfront buffer along the Lake, which comes along the back corner of the proposed garage. The plan depicted a 50' setback from the centerline of the road. Those two lines go through the proposed garage, creating a small triangle which encroaches into the road setback. Mr. Arnold stated there is a wellhead for the property located behind the proposed garage. There is an existing septic system, tank, pump, and line that runs underneath the road to a leachfield across the road.

Mr. Arnold referred to the variance application, noting that it addresses each of the criteria. He highlighted a few points in the criteria, first in terms of public interest, the spirit of the ordinance, and substantial justice Mr. Arnold stated there was not any harm to the public. The proposal is a minor encroachment into the setback. Mr. Arnold noted there are several other properties in the area which have a similar setback ranging from a distance of 35' to 45' and are identified in the narrative. Therefore, the proposed garage is consistent with the character of the neighborhood.

Mr. Arnold spoke to diminution of property values, noting that a letter dated February 15, 2022, from Realtor Bianca Contreras opining that the variance will not adversely impact the surrounding property values. He noted that by putting a garage on the property will benefit the applicant to be able to store cars, equipment, lake toys, and other things out of sight, making the property more attractive.

Mr. Arnold next addressed the unnecessary hardship criteria, stating that the location of the proposed garage is the only place the garage can go on the property. There is the wellhead, the shed to the north, the sight slopes upward. Mr. Arnold added that they may be able to shift the garage slightly, but in doing so, there will not be a dramatic impact on what the setback is from the road, and the downside would be that it would require excavation to deal with the topography, and more impervious surface. The location of the proposed garage sits on top of a paved turn around in the existing driveway, creating minimal impact on the pervious surface and minimal site work. The primary concern is to keep the garage away from the Lake and minimize the site disturbance.

In closing Mr. Arnold stated the proposed garage is a reasonable use of the property and the location is the best place for it as it minimizes the impacts. Mr. Arnold answered any questions from the Board.

Chairman Stephens asked that the Board first determine whether this development has the potential of Regional Impact and take a vote on that determination. Mr. Stephens polled the Board by roll call vote asking each if they felt that this project for the Larson's (131-30) would have any potential for Regional Impact? Roll call: Rob – No; Sean – No; Nick – No; Mike – No; Bob – No.

Chairman Stephens questioned how many members were able to view the site. Members St. Peter, Mills and Stephens indicated that they had been to the site.

Mr. St. Peter commented upon visiting the site, what is on site, is as described. Prior to going to the site, he had questioned if there was the opportunity to relocate a little to avoid the encroachment. The proposed garage is to be located over a section that is already paved, and the lot slopes which would require additional excavation. Mr. St. Peter felt they have cited the location as most reasonable as they could based on the layout of the property itself.

Mr. Poloian noted if it were shifted a couple of feet, it would still encroach on the road setback.

Mr. Mills commented that the project was well laid out and he has no issue. You either encroach on the Lake or the road. Members agreed that they would rather have an encroachment on the road.

Mr. Stephens opened the public hearing for public input and noted there was none.

Planner Sassan stated that the application was straight forward, and that he had no further input. As noted in his staff memo, if a board member were to make a motion for the granting of the variance, they incorporate the seven conditions as suggested.

The Chairman asked if there were any additional questions from the board. It was noted that there were none. The board went into deliberative session to discuss each of the criteria for the granting of a variance at 7:12 PM and came out of deliberative session at 7:17 PM.

During deliberative session, the Members discussed each of the criteria for the granting of a variance. They agreed that granting the variance would not be contrary to the public interest as the encroachment into the roadway did not alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public as the proposed garage is in keeping with other properties in

the neighborhood where other neighboring homes have garages that encroach also. And, if the proposed garage were moved back, it would encroach in the lake setback. For the same reasons as referenced for the first criteria the variance observes the spirit of the Ordinance. Substantial justice is done as there would be a clear loss to the Applicant that is not outweighed by any gain to the public as the variance would allow the Applicant to construct a new garage and denying it would be a substantial injustice. The proposed use will not diminish surrounding properties as the garage will be new construction and would improve the value of the Property and the values of the surrounding properties, therefore increasing taxes, as well as being able to store miscellaneous items out of view of the neighbors. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship as special conditions exist such that a literal enforcement of the provisions of the Ordinance will result in unnecessary hardship as Wentworth Shores Road bisects the Property, the location of the existing leach field, an access easement benefitting the adjacent property, and an underground septic line serving the property and the proposed use is reasonable.

There was no further input from the Board or public. The voting members were Rob, Sean, Nick, Mike, and Bob.

MOTION: Mr. St. Peter made the motion to grant the request for a variance from Sections 3.2.1 for John Arnold, Orr & Reno as agent for Walter C. Larson, Jr. Revocable Trust of 2013 & Sarah J. Larson Revocable Trust of 2013, Tax Map 131 Lot 30, to construct a garage to be located 41'-2" at its closest point to the centerline of Wentworth Shores Road, subject to the following conditions: 1) 1. Garage limits shall be located and pinned in accordance with this approval by a NH licensed surveyor prior to construction. 2) Project shall obtain necessary state and local permits, to include NH DES Shoreland approval and approval of a town building permit, and all conditions of such permits shall be perpetually complied with. 3) Garage shall only be used as accessory to the existing single-family use. Any future changes to the structure or its use shall be subject to required approvals. 4) An approved building permit must be obtained prior to commencing construction and all necessary inspections shall be successfully completed prior to use. 5) All representations made by the applicant and applicant's agent shall be incorporated as a condition of approval. 6) The applicant and owner are solely responsible to comply with conditions of approval. 7) Per RSA 674:33, approval expires on 3/16/2024 if use is not substantially acted on, and further to close the public hearing and to direct staff to draft a formal Notice of Decision for Board discussion only, based on the Finding of Facts during tonight's hearing, which will be reviewed for accuracy only and signed by the Chair at their next meeting. Mr. Mills Seconded. The Motion carried Unanimously.

Mr. Stephens noted the right to appeal in accordance with NH RSA 677:2 would begin tomorrow.

2. Continuation of Public Hearing Mark & Jacqueline Koss (140-16 & 170-12) (Bean Road)
Variance from Section 9.1.4

Chairman Stephens stated that this was a continued hearing for Mark & Jacqueline Koss.

Attorney Ethan Wood, Normandin, Cheney & O'Neil, and Mario Focareto of Brown Engineering were present representing the applicants Mark & Jacqueline Koss. Mr. Koss was present in the audience as well.

Mr. Wood noted the information requested by the Board at the prior hearing had been supplied to the Town. The materials provided included the wetland report Mr. Koss had conducted regarding the wetlands on the property, and information with regard to the culvert. Attorney Wood stated he would be willing to answer questions with regard to the information that had been provided or information discussed at the prior meeting. Mr. Wood offered to review the criteria again.

Chairman Stephens asked members if they wanted Attorney Wood to read his narrative on the five criteria again this evening. Members felt that was not necessary to review the criteria again this evening. The Chair asked that Planner Sassan give a brief overview of what has transpired between the prior meeting where the Board requested additional information.

Planner Sassan stated that he had outlined that in an email to the Board in an email dated March 15, 2022. In the past week they have received a memorandum from Ray Korber of KV Partners, the 3rd party engineer on the project. Mr. Korber's memorandum made some recommendations and in response to those recommendations, Mario Focareto of Brown Engineering, provided a memo with some response comments to the KV Memo, and an amended plan.

Mr. Sassan briefly noted some of the content of Mr. Korber's March 14, 2022, Memorandum. Mr. Korber talked about potentially reducing the road from 24 to 20 feet. Staff recommends that the Board keep that recommendation with the Planning Board. If the Board were to approve that the road needs to be 20 feet, that would be going against the subdivision regulations. The Planning Board has the authority to waive the road width. Mr. Sassan noted it was his understanding that the applicant was prepared to go forward and request the 20 foot narrowed road.

The second recommendation was that the use of retaining walls may reduce impacts, Staff advised that the Board ask the applicant any questions they may have about that recommendation.

The Planner commented that in reviewing the minutes of the last meeting, there was a discussion about the Board's scope on this project. In his 3/15/22 email Mr. Sassan clarified a point which was raised at multiple points during last month's meeting regarding the Board's appropriate breadth of focus on this case. The Board should consider this an evaluation of two encroachments into the 25' wetlands buffer which are necessary to access two areas of proposed multi-family residential development, recognizing that the specifics are under the jurisdiction of the Planning Board. While the request for relief is specific, it is necessary to acknowledge that the relief is requested as part of some generally defined use, which the Board may or may not deem to be reasonable. However, it would not be appropriate for the Board to home in on specific elements of the project such as the exact type or style of housing, the exact number of units or the exact configuration of the units as specifics of the requested relief are not contingent upon any of those aspects of the proposal.

Chairman Stephens provided his summarization of the comments of the Planner by saying in order to do any development at all, that it is necessary to get relief from that section of the ordinance. You could not put a single family house, or any development, there without getting the requested variance. Planner Sassan replied that in considering the five variance criteria, it is necessary to acknowledge that it is for a purpose. They are not going through the wetlands for no reason. Mr. Sassan noted that he agreed with what the Board was saying. The relief the applicant is requesting does not change if it were different. What if they were putting in twenty houses in phase one and twenty in phase two, they would still need the same crossing. Therefore, getting into the specifics of the number of units, in Mr. Sassan's mind is not germane.

Mr. St. Peter noted that after listening to comments from the public at the prior hearing where there was discussion about the wetlands, he was confused. The variance application before the Board is for two very specific areas where the wetland buffers are being impacted. There was a lot of testimony from people that the whole area is wet, and if you build this all out it's going to disturb the whole wetland. It was Mr. St. Peter's thought that the reason for the 3rd party peer review was to make sure that all of the wetland was being dealt with properly. In his reading, it's his understanding that that is up to NH DES. It's not up to the Board. Chairman Stephens responded that DES approval is required for one of the two variances. The first variance is not crossing a wetland, it is only for encroaching on the 25 foot setback. The second variance is for a culvert that will cross an active wetland and will require DES approval. Mr. St. Peter

commented that there are wetlands all over the property, and there has been testimony that this project will disturb wetlands. Is the reason the ZBA is not addressing all the wetlands, and only addressing these two pieces is because DES is the one who determines whether or not what the developer is doing is impacting the wetlands or is it up to the Board? Mr. St. Peter asked if the ZBA asked for the peer review to make sure that this project will not negatively impact the wetlands or were they only asking for a peer review on the two pieces that are before them? That is where the confusion is. Is the Board's job only to talk about those two pieces even though there are wetlands all over the property? Mr. Stephens commented that it was his understanding that was the responsibility of the Board. They are looking at the two variances that impact those sections which the applicant has applied for.

Mr. DeMeo commented that the Board is being asked to enter the wetlands buffer at Bean Road and further in, the culvert crossing between the two pieces of land, without being told any of the details of it. They have provided some engineering data but are being told that review is up to DES and not the Board's responsibility. Mr. DeMeo noted there were questions about snow storage, the sidewalks, and curbs, and he felt that it was important for the Board to understand if they are going to approve access into the wetland, he wants to know what and how they are doing it.

Planner Sassan weighed in saying that this is not being left to DES. Following the last meeting there was specific direction from the Board that they felt they needed further information. The 3rd party reviewer was contacted and asked to directly review the impacts pertaining to this case. Mr. Korber provided his memo. The Board now has the Saddleback Report, the 3rd party review comment specifically to this variance request with the engineer's response to that along with plans, and they are here tonight to answer questions. There has been a lot of information presented, but there still may be questions. Mr. DeMeo questioned if it was within the scope of the Board to ask those type of questions and not to leave it to the Planning Board? Mr. Sassan stated that all aspects of the development are under the justification of the Planning Board. The applicant is here because there are two places in the development that intersect the 25 foot wetland buffer, so it would not be appropriate for the Board to evaluate a wetland completely on the other side of the property and potentially deny the request on that. However, the Planner noted that he was advising the Board that they have to acknowledge that this is in relation to a use. They are not just cutting down wetlands for no reason which would assumingly result in a denial.

Mr. Mills questioned what would this variance allow them to do today? This is a commercial / residential use. Mr. Sassan replied nothing on the ground. It allows them to move forward in their planning processes. Mr. Mills clarified it that meant until they have approval from DES and the Planning Board, nothing can really substantively move forward construction wise? Mr. Sassan replied right. The zoning ordinance basically says if you're doing a development subject to the Towns commercial standards you cannot get going until you have final Site Plan Review approval. That means satisfying any conditions of approval which would include obtaining all necessary federal, state, and local permits. Mr. Stephens added that the property, as it sits today, has to remain as it sits today until such time that all those approvals are obtained. That includes extending the road, cutting trees, or any of that kind of stuff. Mr. Sassan noted that the applicant is not restricted from potentially doing some things that would be permitted on any property. Nothing related to a residential development can go forward. It was noted that the wells have been drilled.

Mr. Stephens requested information about the retaining wall, the concept, and why that is being proposed. Mr. Focareto stated they had received Mr. Korber's 3rd party review letter dated March 14, 2022. Mr. Korber requested ways in which they could minimize the impacts. Mr. Focareto commented that often times you can eliminate some of the grading with a retaining wall. They found that in the case of the crossing because the retaining wall would only be about 6 feet tall, it's not holding back much. The construction of the retaining wall would disturb some land itself. Mr. Focareto noted that they still had the stream bed that is being relocated with the proposed culvert and the stream bed would have to be brought to grade. That work could not be done by hand, but by small machinery to fill it in and compact it, then construct the wall.

There would be minimal land that would be undisturbed in either one of the two designs. In looking at the two designs, Mr. Focareto thinks that the original proposal with the slanted 2:1 slope is the best way to go. That will meet the states avoidance and minimization standards for DES.

Mr. Focareto stated at the entrance the retaining wall does not work and he briefly stated the reasoning why as contained in his response letter of March 14, 2022, to Mr. Korber's 3rd party review Memorandum dated March 14, 2022. In order to install the wall, the proposed sewer main would have to be relocated and would no longer tie into the existing manhole on Bean Road, but instead, would have to tie into a new proposed manhole approximately 60 feet upstream which would require significant additional work within Bean Road. Also, the installation of a retaining wall would remove the shoulder of the roadway and require a guard rail. In order to minimize the impact to the greatest extent, they would need to remove the level spreader that is proposed within the wetland buffer. Mr. Focareto stated that they recommended not removing the level spreader due to its sole purpose is to protect the wetlands from the point discharge being created by the driveway culvert. The level spreader will not only dissipate the energy from the flow of water, but it will also act as a pre-treatment basin, which will help take sediment out of the drainage prior to entering the wetlands. Mr. Focareto stated the level spreader is required and have been approved, as designed, by NHDES Alteration of Terrain.

Mr. DeMeo questioned what they were doing on the sides of the road to replenish the disturbed area? Mr. Focareto stated there is some landscaping to be done at the entrance. There will be a sign for the entrance of the site, which will be on a stone wall which will look similar to the existing stone walls. The remaining area will be loamed and seeded, except for the plunge pool, which will have rip-rap stone.

The Chair opened the discussion for public input at this time. Mr. Stephens noted that the Board is discussing relief from the setback of a wetland in two specific areas on the property in order to accomplish some development. The development at this point, for this board, is not the subject of conversation that is occurring at the Planning Board level.

Attorney Christopher Boldt of Donahue, Tucker & Ciandella, PLLC (DTC) – on behalf of the Town of Center Harbor. Mr. Boldt commented that he believed that the Board got it wrong on their decision on Regional Impact, because it is the project that needs to be considered and not just the area of variance request alone. It is the development that is to be considered for the application before you. Mr. Boldt stated that it was a “no harm, no foul” so long as the Board is letting him speak and deemed to be an abutter for appeal purposes.

Mr. Boldt noted his concern for the ZBA is that they are looking at two 25-foot buffer impacts, which are the no cut, no disturb buffers to the wetlands. Mr. Boldt does not believe that the Board can look at this in a complete vacuum because of the five criteria, the spirit of the ordinance and the public interest are bled into that. It's not just the final part of the fifth or unnecessary hardship, you cannot do anything without getting these, you still have to be looking at spirit of the ordinance and public interest. Mr. Boldt stated there are many areas in the ordinance that talk about the protection of wetlands and this buffer is a no cut, no disturb buffer. It's not the 50 foot buffer, where arguably the road could be there without a problem. In his opinion, that knocks it up for the Board to consider why is this going on?

Mr. Boldt stated there were two variances, one up front and one for is for a significant stream. He noted the square footage of the stream itself does not appear to be in the calculus.

Mr. Boldt feels that there are three options that the Board has regarding the variances, they could deny both, they could deny one and grant the other, or they could deny without prejudice to see what the Planning Board ends up doing with the project as a whole. At the very least, a condition of approval would be they

have to have the Planning Board approval. It has been noted that due to the proximity of the pollution on the dry cleaner site, the wells may need to be relocated, changing the layout of the site plan.

Mr. Boldt noted a concern with the Saddleback Report, stating that in his reading of the prior minutes the developer acknowledged they were not following the Saddleback information. They are hitting some of the recommendations, but not all of them. Mr. Boldt noted his concern with the rerouting of the stream.

Mr. St. Peter commented that he had previously asked when determining the potential for regional impact, were they only supposed to consider the two variance requests. The Chair noted that when the Board did the regional impact, they based it strictly on the variance requests before them, not the project large scope as it is before the Planning Board. Mr. Stephens stated he did not disagree with the Planning Board's statement that it has a regional impact. He was keeping the ZBA's view very narrow as far as what were they asking of us.

Planner Sassan noted that as Mr. Boldt indicated no harm, no foul, and he has been allowed to speak. The decision regarding regional impact was made at the prior meeting and he did not believe that the Board acted unreasonably in making that decision. Mr. Sassan noted that the advice given was these are very specific variance requests. He directed members to the last paragraph of his email in which he was trying to best explain the fact that it does have to consider that yes indeed there is a development that's happening. The following is what was contained in Planner Sassan's email of March 15, 2022.

Lastly, I want to further clarify a point which was raised at multiple points during last month's meeting regarding the Board's appropriate breadth of focus on this case. The Board should consider this an evaluation of two encroachments into the 25' wetlands buffer which are necessary to access two areas of proposed multi-family residential development, recognizing that the specifics are under the jurisdiction the Planning Board. While the request for relief is specific, it is necessary to acknowledge that the relief is requested as part of some generally defined use, which the Board may or may not deem to be reasonable. However, it would not be appropriate for the Board to home in on specific elements of the project such as the exact type or style of housing, the exact number of units or the exact configuration of the units as specifics of the requested relief are not contingent upon any of those aspects of the proposal.

Carla Taylor – 34 Bean Road. Ms. Taylor had a few questions regarding the proposed roadway. She noted the Applicant stated they needed the roadway to be 24 feet in width for the first 300 feet to get into the site. Ms. Taylor questioned what the measurement was from her property line, the stonewall, to the sidewalk. She requested clarification for the sidewalk, is it on both sides of the roadway or on the high side of the roadway and what is separating the roadway from the sidewalk, is it a curb or a white line demarcation on the roadway. Ms. Taylor questioned what the distance between the driveway will be to a single family home. Mr. Stephens commented that the width of a driveway would be addressed at the Planning Board through site plan review.

Mr. Focareto, Brown Engineering, stated that it was approximately 300 feet to the first intersection. Proposed is a 24 foot wide roadway that is delineated by a white marking as other streets in town are. If the Planning Board allows a 20 foot wide roadway, in order to protect the pedestrians, they will install a curb to raise the sidewalk. In either situation, the drainage will be captured in the grass lines swale and go into the plunge pool. Mr. Focareto noted that the abutters house is uphill from the site and does not believe there is a need for her concern regarding runoff in that direction. Mr. Stephens noted the nature of one of Ms. Taylor's questions was the sidewalk. The delineation of what that might possibly be as described by Mr. Focareto is predicated on what happens at the Planning Board level with regards to the width of the roadway. Mr. Focareto stated that he has not made the measurement of the distance from the property line to the sidewalk. Attorney Wood interjected stating that it was outside of the buffer. It is outside of the setback, and they are complying with the zoning requirements. As far as what the actual number is, it

doesn't matter as they are not encroaching into the setback. They do not require a variance for it. Members questioned what the setback was that the Applicant was complying with? Mr. Wood stated that it didn't matter. The Town has not identified a setback that they need a variance for, and that's what the ZBA is supposed to be looking at. Mr. Wood commented with regard to where the sidewalk is located, it is located outside of the side setback that is required with regard to the property line. There is no variance required. Mr. Wood noted that he understood the question about how far the sidewalk is, and the answer is they don't have that number, all they have is that it's outside of the setback that would be required. Chairman Stephens noted concern with how Mr. Wood could make that statement without having a requirement and a determination as to whether or not you are not in violation of that requirement. Mr. Mills asked Planner Sassan if there was a setback requirement for a roadway. Planner Sassan stated none that he was aware of for a roadway. There are driveway regulations, which have a 5 foot setback, which this does not trigger because the driveway permit was obtained from the state. Mr. Mills questioned if there was a setback for sidewalks? Mr. Sassan replied no. The Town allows things such as patios in the setback, and there is no indication that a sidewalk would not be. Discussion ensued regarding any necessary setback requirements for a roadway and/or sidewalk from the abutting property line. There is no regulation as to how close you may be to an abutting property line with a road. Ms. Taylor stated that she and the abutters were here so the Board could approve a variance for the roadway that encroaches on the wetlands. If you look at the plan, there is not enough room to begin with to get there. Ms. Taylor noted the curb is level with her bottom lawn, and she will get the swale runoff.

Members questioned the distance and if there was a need for a variance for the entrance way of the road. Mr. Sassan stated that he could review this again, noting he did not see that it violates a regulation or ordinance.

Attorney Mark Rouvalis – representing Bryan and Elana Murphy – 36 Bean Road. Mr. Rouvalis stated the reason the Board is in this position is because the applicant chose to come before the Board before they knew what their final plan is. They are now saying the plan is going to change, the width of the road may change, where the road is located may change, noting the plans show the road crosses the Taylor property. Mr. Rouvalis stated this is premature and the Board should not decide this tonight. They should have a final plan and know how many other variances that may be required as a result and then address them at once. Mr. Rouvalis does not think that it is correct for the Applicant to go back to the Planning Board, alter the plan and say that the approval the ZBA might grant on the basis of a specific application before the Board, and specific information before you is still valid. Mr. Rouvalis stated that is reversible error. Mr. Rouvalis commented there was information that was recently submitted by Mr. Focareto that they have not had the opportunity to review. There are lots of questions about whether the process can go forward as it's planned now that's before the Planning Board. There is a huge question about whether they have properly counted the wetlands. A week ago there was a discussion whether the applicant has properly included things in setback requirements that will allow them to go forward with this development at all in the way that it is currently configured. Mr. Rouvalis reiterated that the application was premature and encouraged the Board not to make a decision on this tonight, but to defer until they get a final plan approval and know whether they are going to have 60 units, 20 units, 10 units or no units.

Mr. Rouvalis commented that the Board was spending a lot of detail time and effort, giving it serious consideration with all the information they have now, but they ought to be taking a step back. This would allow the Applicant to get their plan in order and come back to the ZBA with a full plan, with final information that they can make an informed judgement about. They're asking the ZBA to guess, what is it going to be, and how is it going to be. Mr. Rouvalis encouraged the Board, if they were not going to deny it outright, to delay a decision until they have a final plan approved and you know where the road is going to go and what's going to be included, how it's going to affect the wetland setback. No cut and no disturb. Mr. Rouvalis stated that he joined in the comments of Attorney Boldt, Carla Taylor and his clients are potentially affected by the development.

Mr. Rouvalis stated they would be back before the Board again, as he suspects that there will be other variances required or there are going to be other changes, and if you make a decision then they try and move forward, it's going to be problematic. Mr. Rouvalis stated the Board was giving him a basis to challenge their decision because they did not have a firm plan, or the plan is changing before the Board.

Mr. Poloian commented that he agreed with the comments that the Board is being asked to guess about certain things. The Board has done that before and they've always come back and said "We're not going to make guesses anymore. We're going to force people to have finals plans..." Mr. Poloian stated that it was said that the wells might even have to be redrilled. When are they going to know that? Attorney Wood spoke in regard to the wells, stating that there has not been any requirement that they be redrilled at this point. Mr. Poloian stated that someone mentioned the fact that because of the close proximity to the laundromat, they might have to be. Mr. Wood stated they might. Given to the extent that they do, that is certainly going to deal with. But what we're talking about are the two encroachments into the buffer. One by the road, and the other where they cross the stream. That's it. We're not talking about anywhere else. So those are the two areas, where without the variance to encroach into that 25 buffer, they cannot develop the property.

Mr. St. Peter asked Mr. Wood if he was guaranteeing the Board that any of these other items that you're saying we don't need to be concerned with, would not have any impact on the two pieces we're considering? There's absolutely no possibility that there could be changes that would impact that. Mr. Wood replied no that he was suggesting... These are the two things you need to be concerned about. You as a Board can certainly put conditions upon these variances. You could say it's conditioned upon site plan approval, the areas where encroachment occurs staying the same, but there is no reason the Board cannot approve the variance today, subject to those conditions.

A lengthy discussion took place with members noting their concerns that the plans may change as a result of things such as the relocation of the wells could change the location of the road or if they could fit it in. Mr. St. Peter asked why would the Board not hear the variances once they know where everything is going to go? The Planning Board will have approved the plan and there are no other variances that have come up. They then come to the ZBA with a clean slate that says it's all figured out. It's a solid project, there aren't any other issues that the ZBA will need to worry about later and then request a variance for these two pieces. Mr. St. Peter commented that he would feel very comfortable moving forward with that. as the Planning Board may require changes, if they do, it could impact the ZBAs decision and the five criteria they need to actually look at the whole impact. The Board needs to answer the criteria to the project. Therefore, they need to know what the project is, and they don't know. Mr. Mills commented that he felt the two variance points can be made stipulative, and the Board can control to a degree. Mr. Mills noted if someone were to try to put a single family home on that back corner, and put the exact same road through there, would anybody be sitting here right now? Mr. Mills clarified he was only referring to the two variances. Mr. St. Peter commented that the variance for where you enter the property determines where the road goes.

Mr. St. Peter stated he was stuck and did not feel that he would do a good job if he had to make a vote now. He did not know how he would vote as he still felt that he did not know enough. Mr. Poloian stated that he agreed with Mr. St. Peter. Mr. DeMeo stated he was confused. He did not know much more of the crossing they should be looking at. They do have a peer review of the stream crossing, they received good information this evening regarding the roadway entrance, until this evening he did not know that and has not seen a detailed drawing of it. Mr. St. Peter commented because it was not a final product, the applicant does not know everything yet because it's still a moving target.

Mr. Focareto stated that the plan will continue to change as they work with the Planning Board. In order to go forward they need access to the site. The Planning Board is going to ask things of them, and

they are going to change the plan because the Planning Board is asking them to. They have prepared a plan that they are satisfied with, 24 foot wide roadway, and they said it may change. It was the 3rd party engineer that said they could minimize the impact to the buffer. Mr. Focareto stated again that this was going to be a work in progress for as long as it takes to get through the Planning Board. For the ZBA to ask for a plan that is said and done, get state approvals and all the town approvals they will need, then come to the ZBA and ask if they can get access to their site? That is why they are before the Board. They need access to the site. They will go through the Planning Board and work with the Board and will do what is required of them. They'll get their state permits. He noted that there are concerns about the wells. There is a lot of testing which is highly regulated. As long as that is a community well, it will be tested.

Mr. Mills clarified his position stating that if the two variances were coming before the Board exactly as they are right now, and they were not going to change, he would be okay moving forward and would make it contingent. He was not one hundred percent convinced that there aren't more variances needed.

Planner Sassan stated that it was identified early on in early discussions with the Applicant and the Planning Board that this is a pretty complex case. It is possible that things will come up as it deliberated, and it is possible that another variance or another need to come before the ZBA may be identified as this moves forward. That is inevitable that that may happen. Regardless of whether the Board makes any conditions regarding future changes to the plan, if the applicant receives their approvals and they plan to do something that is outside of the limits of the relief that was granted, they will have to come back before the ZBA. If not, he did not see why they would need to come back before the ZBA for those two crossings if those two crossings haven't changed. Unless the use drastically changes. That would go without saying because the weighing of the criteria might vary. Mr. St. Peter commented that they have heard from one attorney who said that's on the table, this could change drastically. Mr. Sassan replied then they would potentially have to come back regardless of what conditions you place.

The discussion continued regarding impact, substantial changes, things that change the design of the project that changes locations, crossings, locations of wells which may make the road move. If the road moves, does that mean the stream crossing location may change.

Attorney Boldt suggested if the Board considered the first entry point, the first encroachment on the no cut, no disturb, granting it with the conditions that have been discussed, then either table or deny, without prejudice, the second variance which is the greater impact that may change based on a number of factors. Then you are stratifying the desire to get something approved so that some planning can go forward, and the Planning Board knows the ZBA has said that the amount of encroachment for the entrance meets their satisfaction and gets a variance, and then they can hear what the Planning Board needs on where the number of lots are. Come back to the ZBA if the plan has a different configuration for various reasons.

Attorney Rouvalis reiterated his prior comments that the Board deny the application without prejudice and come back once they know more.

Chairman Stephens stated that the Board had a decision to make, and the decision is either to continue the hearing for the additional Planning Board information, to move forward to treat each of the two variances independently in terms of voting on each. It was suggested one possibility of dealing with the entryway off Bean Road and treat the second at a later date possibly, or deny, giving the Planning Board time to work through their extensive process or go through the criteria and find out where it goes.

Planner Sassan commented that more common practice is to come to the ZBA to get necessary relief and then go to the Planning Board with an application that essentially complies with the ordinance as it would have those necessary of relief.

The discussion returned to the concerns of some members who did not feel comfortable moving forward without knowing what the final plan was going to look like. Would there be changes, and if there are, would that affect their decision.

Lorraine Paul – 188 Mead Farm Road, Center Harbor. Ms. Paul noted her concerns with the wetlands and the project as a whole. If the Board were to place conditions on the approval, they will have to very detailed in the verbiage. She questioned how will they monitor those conditions?

George Gurney – 41 Mosswood Road, Center Harbor. Mr. Gurney noted his concerns with the regulation which states that a wetland of less than 20,000 square feet does not need any buffer. If it is contiguous with a stream, then it is part of the stream. He then noted his concern with variance requested and is said to only impact 448 square feet of wetlands and does not agree with that. Mr. Gurney spoke to the necessity of wetland buffers and their function in filter water prior to entering the lakes.

Bruce Cohen – 58 Bean Road. Mr. Cohen commented that Attorney Wood stated that if the Board did not grant the variances, they would not be able to do the project. Mr. Cohen noted Mr. Focareto said that if they did not get the variances tonight, they couldn't have access to the property, asking access for what? Mr. Cohens concern was that if the variances are granted, what can they do. Mr. Stephens stated this is a commercial application before the town to create the development. It has to follow all the rules and therefore they cannot clear cut the property. Mr. Cohen commented that they have already built a partial dirt road, they have already torn down a stone wall, they've already dug holes for wells, and the question is what do they need the variances for tonight? What do they need access to the land for that they can't get from the road that they already built or from walking in? Mr. St. Peter followed with if he were posing that question, he would follow it with if they're not allowed to do anything on the property even if the ZBA grants the variance, why do they need the variance tonight?

Planner Sassan commented that an applicant doesn't need his approvals a day before they start building. There is a process that the applicant needs to follow. Normally that process involves getting your ZBA approvals first, then going through the Planning Board. Yes, issuing a decision this evening isn't going to open or close the door to anything that could have or would happen tomorrow, but it wouldn't be appropriate for the ZBA to say we can wait until the day before they plan on starting the project because they don't need their variance until that point. Several members replied that they were not saying that.

A discussion ensued regarding the improvements that have been made to the property without any approvals at this time, what could be done to the property if the variances were granted, who would enforce any conditions that may be placed if an approval was granted.

Chairman Stephens questioned if the members wanted to move forward with the criteria for the granting of the two variances, deliberating and possibly voting on each separately. Members agreed with voting on each encroachment individually, the entry and then the crossing. Mr. St. Peter questioned if they were stuck, could that be a decision as part of the deliberative session to move on.

The Chair asked if there were any additional questions from the board. Hearing none, the board went into deliberative session at 9:37 PM to discuss each of the criteria for the granting of the variances beginning with the entry as variance one and the crossing as variance two and came out of deliberative session at 9:58 PM.

During deliberative session members began a discussion of the criteria for the granting of a variance. Mr. St. Peter questioned how the Board was applying the criteria. Mr. Stephens commented they

would go through all five criteria for the first variance and then the same for the second. The Chair read criteria one, relating to public interest into the record. Mr. St. Peter replied that he had two answers. One is if the way the entry way is designed and where it impacts just the buffer, does that threaten the public, he does not think it does. It has been designed well as indicated by the 3rd party review. If the entryway leads to what's going to impact all the wetland, that could be contrary to public interest. So, granting the variance and allowing a road to go in there that could impact that area, is contrary and does not think the Planning Board will ask themselves those questions, as they don't use this criterion.

There was a lengthy discussion once again over how you apply the criteria, do you just look at it as the impact on the buffer in that entrance area only, or do you look at granting the variance would open up what will impact the remainder of the property.

Chairman Stephens noted it was the sense of the Board that it is very difficult for the members of the Board to evaluate this in relationship to a specific narrow band verses the larger picture. Mr. Stephens felt that dealing with counsel would go a long way to resolve some of the confusion that exists within the Board. He stated that it is possible to have a non-meeting with counsel and at this point in fairness to the abutters and to the applicant that the Board needs clarification to be able to adjudicate this fairly. The Chair made a motion that the Board continue the hearing to a date specific to allow for the Board to converse with counsel.

Motion: Mr. Stephens moved to continue the public hearing for Mark & Jacqueline Koss (140-16 & 170-12) to April 6, 2022, to allow time for the Board to meet with town counsel for a non-meeting to get clarity on the scope of evaluation the Board is requesting. Mr. DeMeo Seconded. The Motion carried unanimously.

V. Correspondence: - None

VI. Unfinished Business:

1. Review and possible authorization for the Vice Chair to sign the formal Notice of Decision for the February 16, 2022, granting of a Limited Special Exception/Temporary Use for Brianna Stephens, Member of Lake Life Headquarters LLC for a parcel located at 87 Whittier Highway (Tax Map 141, Lot 12).

The Board reviewed the draft Notice of Decision prepared by staff, as directed by the Board at the hearing on February 16, 2022. There were no changes made to the document.

MOTION: Mr. Mills made the motion to approve the formal Notice of Decision as written for Brianna Stephens, Member of Lake Life Headquarters LLC for a parcel located on Tax Map 141, Lot 12, 87 Whittier Highway, and staff to mail said notice to the applicant or applicant's agent. Mr. DeMeo seconded. The Motion carried with Mr. Stephens abstaining.

VII. Adjournment: Mr. Stephens made the motion to adjourn. Mr. DeMeo Seconded. The Motion carried Unanimously, and the Board adjourned at 10:05 PM.

Respectfully Submitted,
Bonnie L. Whitney
Administrative Assistant

NOTICE: These DRAFT Minutes have not been formally approved by the Zoning Board of Adjustment. Please contact the Land Use Department after the next meeting of the Moultonborough Zoning Board to learn if any corrections, additions, or deletions were made.